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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 10, Original

THE STATE OF WYOMING,
COMPLAINANT,

vs.

THE STATE OF COLORADO,
DEFENDANT.

MEMORANDUM RE POWERS OF THE ATTORNEY GENERAL.

BYRON G. ROGERS,
Attorney General of Colorado.
HENRY E. LUTZ,
Deputy Attorney General.
SHRADER P. HOWELL,
Assistant Attorney General.

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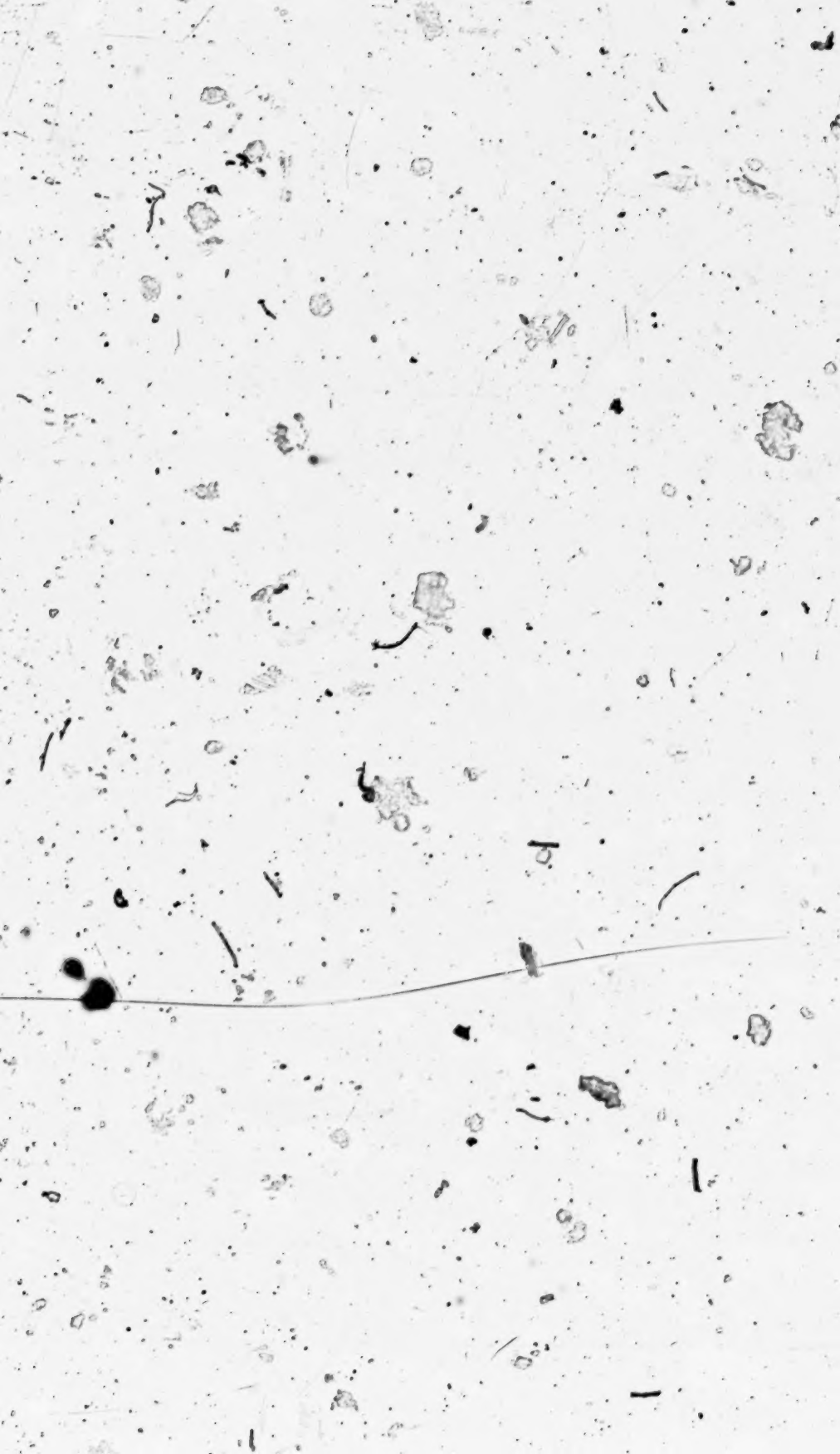

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MEMORANDUM RE POWERS OF THE ATTORNEY GENERAL.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

FOREWORD.

Honorable Ralph L. Carr, Governor of Colorado, having assumed to remove the undersigned Attorney General of the State, from participation in the above designated cause, and having assumed further to take control of the current proceedings herein, there is herewith respectfully submitted for the consideration of this Honorable Court a brief memorandum as to the powers of the Attorney General as defined by statute and judicial construction from

which it will appear that the Governor of Colorado is destitute of right, power or authority, to assume to displace the Attorney General, employ counsel, control litigation, or to represent the State.

MEMORANDUM.

Many duties have been cast by various statutes upon the Attorney General, and it is provided (Section 1, Chapter 13, Vol. II, C. S. A.):

> "The Attorney General shall attend in person at the seat of government during the sessions of the General Assembly and the Supreme Court, and shall appear for the state, prosecute and defend all actions and proceedings, civil and criminal, in which the state shall be a party in interest, when required so to do by the governor or general assembly, and shall prosecute and defend for the state all causes in the Supreme Court in which the state is a party in interest."

And it has been repeatedly held that the *Attorney General is vested with all the common law powers attaching to that office*, save in the one or two instances where those powers have been modified by statute.

Reference is first had to the case of *Jobbers' Association vs. People*, 21 Colo. Appeals 325. The information in that case was attacked as having been instituted by the Attorney General without authority, although the information recited the Attorney General had been "first required by the Governor of Colorado to prosecute this action". It was held by the Court,—

> "It seems quite clear that under this state of the law and fact that the attorney general was thus clothed with sufficient authority to institute the proceeding. But if not, then there can be no doubt that he is so authorized under the common law as judicially determined in this country."

The Court then refers to *20 Bradwell, page 288*, respecting the common law powers of the Attorney General. Reference is likewise made to the case of *People v. Tool*, 35 Colo. 236, where it is said:

> "It is the function of the Attorney General, by information, to protect the rights of the public, * * * ", etc.

It is to be noted that this case does not accord the statute quoted supra (Section 1, Chapter 13), as conferring upon or enlarging any of the powers of the Attorney General. *The statute in question merely imposes upon him the duty to act when requested by the Governor, but is in no sense either an investure of powers or a limitation of them.*

It was held by the Colorado Supreme Court in the case of *People v. Casias*, 73 Colo. 420, at page 423:

> "At the common law the Attorney General was the chief legal representative of the Crown. Our Federal and State governments have adopted the English judicial, as a part of their governmental system. It is generally held by our courts that this office is clothed, in addition to the duties expressly defined by statute, with all the powers and privileges which belong to it under the common law of England."

This case went on to say the Colorado statute there under discussion had conferred upon the district attorneys the Attorney General's common law rights of entering a *nolle prosequi*.

It was also held by the Colorado Supreme Court in the case of *State Board of Pharmacy v. Hallett*, 88 Colo. 331, that the common law powers of the Attorney General attach to his office in Colorado, save where they have been otherwise conferred or restricted by statute. In that case the District Attorney was given the right to represent and advise the Board of Pharmacy and to that extent was a

restriction of the common law powers of the Attorney General. Prior to the passage of the Pharmacy Act, the Attorney General would have been the adviser, and it is said, page 336:

> "Whatever duties the Attorney General had at the common law he still may have, except in so far as they have been taken away by legislative enactment."

There is no statute in Colorado anywhere taking away from the Attorney General the right to represent the sovereignty,—the People of the State. There is no authority anywhere, or power anywhere, either in the Constitution or the statute of Colorado conferring upon the Governor the right to remove the Attorney General in any case so ever. Upon the contrary, there is a Colorado statute to the effect that the Governor himself may not employ counsel in any case save with the consent of the Attorney General.

Reference is had to *Section 5, Chapter 156, Vol. IV, Colorado Statutes Annotated,* which reads:

> "Whenever the Governor is satisfied that an action or proceeding has been commenced which may affect the rights or interests of the state, he may, by and with the consent of the attorney general, employ counsel to assist the proper officer to protect such rights or interests; * * * ."

Section 6 of the same chapter provides that expenses so incurred under the preceding section may be allowed by the Governor and upon his certification shall be paid from the General Contingent Fund,—the consent of the Attorney General to the employment being requisite.

The State of Pennsylvania has a similar enactment respecting employment by state departments of counsel other than the Attorney General, and it was held in the case of *Puccirilli Brothers vs. Lewis, Auditor, and Snyder, State Treasurer*, 282 Pa. 328, 127 Atl. 832, that where the statute

makes it unlawful to employ counsel for the state without the approval of the Attorney General, while the employment of private counsel by the office is proper for the purpose of presenting their views, they cannot file an appearance or control the litigation.

If the principle of the foregoing decision is to be applied, counsel employed by the Governor in the instant case are without right to appear, save possibly to present the Governor's personal views.

By *Section 13, Chapter 3, Colorado Statutes Annotated*, the Department of Law is established and it is recited at Division I:—

> "Division of Legal Affairs, the head of which shall be the Attorney General".

The Governor in his "Executive Order" purporting to remove the Attorney General and appoint other counsel (page 13, Governor's Return) refers to the Colorado Water Conservation Board. That board was established by *Chapter 265, Session Laws of Colorado*, 1937, and it is provided by *Section 7* of that act:

> "The Attorney General shall act as the legal adviser for the board. * * * and with his consent the board may employ additional legal counsel."

Section 9, among other things, requires that:

> " * * *, all legal assistants to be employed with the consent of the Attorney General".

Section 11(k) provides:

> "The Board shall cooperate with the Attorney General in all matters relating to interstate suits concerning the waters of the rivers of the state; and shall arrange for the gathering and compilation of all information, factual, engineering or other data requisite or desirable for the use

of the Attorney General in the conduct of such suits."

The foregoing act, if such were needed, expressly confers upon the Attorney General the sole right to conduct "interstate suits concerning the waters of the rivers of the state". By that act the Governor is chairman of the board. He stands expressly charged with knowledge of all the provisions of the act. Yet instead of requiring the cooperation the legislation specifies, he seeks to nullify its express provisions by a so-called "Executive Order". Neither that board nor its counsel (only permitted to serve by the Attorney General's consent) has any right to represent the State nor is Clifford H. Stone, appointed by the Governor, attorney for said Water Board, but its director only; nor is his purported service in these proceedings with the consent of the Attorney General; nor has the Governor any statutory or other power to designate Mr. Stone or anyone else as the representative of the State; nor can the Governor point to any authority so ever to represent the State himself, either directly or indirectly.

It is significant that the Governor's so-called "Executive Order" points to no authority in pretended justification, other than on page 2 of his Return where he recites *Section 2, Article IV of the Colorado Constitution*, reading:

> "The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed".

But no sanction can be even fantastically spelled out of that provision for the attempted removal of the Attorney General from a case. Nor are the execution of any laws involved herein—merely a dispute as to the contents of a pleading in a litigated proceeding. Nor is the provision above quoted self-executing; nor can the Governor remove any state official for any act so ever. Impeachment alone is the remedy in Colorado. If the Governor's pretended action in the instant case is held to be valid, then he may succeed to the functions of every elected officer in

the State, with or without cause, on a mere "Executive Order". His purported action in the present instance is a mere usurpation, destitute of authority. No preceding governor in Colorado's history has ever assumed like powers, and, of course, Colorado has no applicable adjudications. The matter is purely one of state law and this Honorable Court, it is respectfully submitted, will not invest the Governor of this State with the power he usurps. So to do would be to place him at his whim in the control of the entire state government. He would merely have to disagree as to how any other constitutional or elected officer is discharging his duties, and indeed not even such disagreement would be necessary.

At page 11 of his brief the Governor refers to the early case of *Ex Parte Kentucky v. Dennison*, 24 Howard 66; 16 L.Ed. 717-726. That case involved no question of state law. It was merely held that "the practice" when the state is a plaintiff "has been frequently adopted of suing in the name of the Governor in behalf of the State". It is also there said that a suit against the Governor in his official capacity and character would be recognized as a suit against the state. This Court was not there determining any matter of state law, or adjudicating the powers of state officers as to who had the right to represent the State in this Court, and this Court has historically recognized the Attorneys General of all the states as their proper legal representatives. The Dennison case merely involved the matter as to getting the state into the Supreme Court. In the instant case Colorado has long been in this Court. The Governor undertakes to act as its legal representative, a right exclusively belonging to the Attorney General.

The laws that exist in Colorado on this subject are well stated in *C.J.S., Vol. 7, page 1213:*

> "An attorney general is the chief law officer of a state government or of the federal government, as the case may be. His office as well as his designation or title is one which is derived from the common law of England where from an early date the attorney general has been the chief legal

representative of the sovereign whose duty it is to represent the crown in civil and criminal matters in the courts."

Also it is said in the same work, page 1229, respecting the exclusiveness of the authority of the Attorney General, as follows:

"As a general rule the authority of the attorney general under constitutional and statutory provisions to represent the state with regard to matters of public interest is exclusive although in the absence of a constitutional restriction the legislature may provide special counsel for the state or any of its boards or officers who may act independently and not under the control of the attorney general."

The Governor is destitute of authority for his action in the instant case. He is without right either to demand the withdrawal of the Attorney General's appearance, or to curtail the powers of the Attorney General, or to control the present proceedings. The Attorney General possesses the exclusive right of representation of the State in the absence of restrictive legislation, and there is no such legislation in Colorado.

BYRON G. ROGERS,
Attorney General of Colorado.
HENRY E. LUTZ,
Deputy Attorney General.
SHRADER P. HOWELL,
Assistant Attorney General.